

(2008) 02 AP CK 0065
In the Andhra Pradesh High Court
Case No : Writ Petition No. 1626 of 2008

Sri G. Chinna Babu

APPELLANT

Vs

The Visakhapatnam Urban Development Authority and
Vensar Constructions Company Limited

RESPONDENT

Date of Decision : 25-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 3 ALD 722 : (2008) 4 ALT 113 : (2008) 2 CTLJ 337

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : N. Vidya Prasad, for N. Ravi Prasad, for the Appellant; M. Ravindranath Reddy and P. Raja Sripathi Rao, for the Respondent

Final Decision : Dismissed

Judgement

C.V. Nagarjuna Reddy, J.—The petitioner, who was unsuccessful in the tender process for development of Ultra Modern Layout on joint venture on public private partnership basis at Dakamarri, Visakhapatnam, conducted by respondent No. 1, filed the present Writ Petition for a Writ of Mandamus to declare the action of respondent No. 1 in not entering into an agreement with it in respect of the said contract as illegal.

2. Respondent No. 1 identified an extent of Ac.98.64 cents at Dakamarri, Bheemunipatnam Mandal, Visakhapatnam District, for conversion of the said land into house plots on layout under a public private partnership scheme. It issued "Request for Proposal" (for short "the RFP") to invest, develop, share and market the plots by preparing an ultra-modern layout. Out of twelve agencies which procured the bid documents, eight participated in the pre-bid meeting and at the request of some of them, the tender process was rescheduled by fixing 18-1-2008 as the date for opening of Cover-3 (Financial Proposals), instead of 11-1-2008 as scheduled earlier.

3. The RFP document envisages filing of the bids in three separate sealed covers, viz., Cover-1 for Technical capability; Cover-2 for Techno-Business Proposal; and Cover-3 for Commercial Offer. It provided for evaluation of bids of responsive bidders under three steps. Under steps 1 and 2, evaluation of technical capability and techno-business proposals respectively is undertaken and under step-3 evaluation of commercial offer is done. The commercial offers of five bidders, including the petitioner, were evaluated under step-3 (Cover-3). On 18-1-2008 the commercial offers were opened in the presence of the representatives of the bidders, and the details of their offers, as contained in the petitioner's affidavit, are extracted hereunder and for convenience the figures contained therein are referred with reference to the Columns in which they are mentioned:

						Total
Layout area of the	Development Square	Minimum Percentage	in share in	Guaranteed Bidder	share yards	Sl. No Name
						yards Square yards
						1. M/s.
Ramky	2,38,708.80	50.00%		1,19,354.40		Infrastructures.
						2. M/s.
Image One	4,77,417.60	66.24%		1,73,932.78		Enterprises Pvt. Ltd.
						3. M/s.
Vensar	2,86,450.00	81.04%	74,477.00	Constructions	Company	Ltd.(2nd respondent)
						4. M/s.
Vision	2,85,870.00	68.00%	1,94,391.60	Ventures	Ltd.	(Petitioner)
						5. M/s.
Arihant	2,86,056.00	60.00%	1,71,666.00	Foundations	& Housing	Ltd.

Apprehending that respondent No. 1 may accept the offer of respondent No. 2, the petitioner filed the present Writ Petition.

4. The petitioner's main plea is that respondent No. 2, who failed to file a responsive bid, disqualified itself for being considered under Step-3. According to the petitioner, the figure mentioned by the petitioner in Column-5 "Minimum guaranteed share in Sq.yards" does not match with the percentage figures given by it against Column-4 "Development share in percentage". The petitioner pleaded that by applying the percentage mentioned in Column-4 to the total layout area in square yards mentioned in Column-3, the resultant figure comes to 2,32,139 Sq. yards, which should have been the minimum guaranteed share to be given to respondent No. 1 and that, instead, respondent No. 2 mentioned the figure a 74,477 Sq. yards in Column No. 5.

5. On behalf of respondent No. 1, its Vice-Chairman-Sri G. Venkatram Reddy, filed his counter-affidavit, wherein it is stated, inter alia, that the extent of land available for layout is Ac.98.64 cents, which by conversion into Sq. yards comes to 4,77,621; out of this area, the bidders are required to specify the extents they propose to carve out as plotted area; that out of the said plotted area, they are

required to specify the extent of plotted area they offer to respondent No. 1 not only in terms of percentage of the total plotted area, but also in terms of Sq. yards; and that the minimum upset bid development share should also be indicated in terms of percentage i.e., at 26% of the estimated total layout area. He further stated that on opening of Cover-3 (financial proposal), it was found that all the five bidders have offered more than 26% of the layout area. With regard to the discrepancy between the percentage figures in Column 4 and the figures shown in Sq. yards in Column-5 in the bid offered by respondent No. 2, in paragraph 13 he explained as under:

I submit that when the bid of the 2nd respondent was opened, it was noticed that the total plotted area it proposed to carve out of the said Ac.98.64 cents (4,77,621 square yards) was 2,86,450 square yards and the percentage out of the said total plotted area to be offered towards the share of the 1st respondent in terms of percentage was mentioned as 81.04%. Whereas, though the said 81.04% of 2,86,450 works out to 2,32,139.08 Square yards, but the 2nd respondent has shown the said figure, in terms of square yards as 74,477 square yards only. In fact, the said 74,477 Square yards represents 26% of the said total plotted area of 2,86,450 square yards (proposed by it) which is the Minimum Guarantee Share any bidder is required to offer. Thus, it is evidently a clerical mistake.

(Emphasis added).

The Vice-Chairman of respondent No. 1 further averred that after opening of the commercial offers on 18-1-2008, the above mentioned mistake was pointed out by the officials of the consultant of respondent No. 1 (APITCO) and discussion ensued on the same between the representatives of respondent No. 2, officials of APITCO and the writ petitioner, which was also videographed and shown to the counsel and two representatives of the writ petitioner in the office of the Standing Counsel for respondent No. 1 on 16-2-2008; that respondent No. 2, on the same day, submitted a representation stating that the plotted area offered to the share of respondent No. 1 is 81.04 % of 2,86,450 Sq. yards, which comes to 2,32,139 Sq. yards and not 74,477 Sq. yards, which was a clerical error; and that the same may be treated as 2,32,139 Sq. yards. It is further pleaded that since respondent No. 1 was satisfied that it was a bona fide clerical error and in view of the huge disparity of Rs. 13.00 crores, in terms of the prevailing market value, between respondent No. 2 and that of the petitioner, who is the second highest bidder, it sought for the opinion of its consultant-APITCO by forwarding the representation of respondent No. 1 with covering letter dated 18-1-2008 along with its evaluation report; that the latter, vide its evaluation report dated 21-1-2008, opined that respondent No. 2 committed a clerical mistake; that respondent No. 2 has power to permit the bidders to correct such errors in public interest, provided a request is made for the said purpose; and that respondent No. 2 considered the said evaluation report and accepted the same, vide its proceedings dated 22-1-2008, and issued letter of award dated 24-1-2008 in

favour of respondent No. 2. It is further averred that consequent on the issue of letter of award and acceptance by respondent No. 2, respondent No. 1, vide proceedings dated 24-1-2008 communicated its decision to the remaining four participants, including the petitioner, with instructions to them to approach respondent No. 1 to collect their Bank guarantees.

6. At the hearing, Sri N. Vidya Prasad, learned Counsel for the petitioner, submitted that respondent No. 1 committed a patent illegality in accepting the commercial offer of respondent No. 2. He relied upon Clause 6.7.1 of the RFP and contended that bids which are incomplete in any respect or those which are not consistent with the requirements as specified in the RFP may be considered non-responsive and shall be liable for rejection. He also placed reliance on Clause 6.7.8 - which provided that no change in or supplementary information to a bid shall be accepted once submitted; that, however, respondent No. 1 reserves the right to seek additional information from the bidders if found necessary during the course of evaluation of the bid - and contended that in this case respondent No. 1 never sought for additional information and its entertainment of letter from respondent No. 2 and allowing correction to its bid document is contrary to the said clause.

7. Sri M. Ravindranath Reddy, learned Standing Counsel for respondent No. 1 and Sri P. Raja Sripati Rao, learned Counsel representing respondent No. 2, submitted that the figure mentioned in Column-5 "Minimum guaranteed share in Sq.yards" is a mere bona fide mistake and that respondent No. 1, which has power and discretion to permit correction of such a bona fide mistake, rightly treated the same as such and awarded the contract in favour of respondent No. 2. They further submitted that there was certainty in the offer made by respondent No. 2 in terms of percentage and Ex.9 Commercial Offer Evaluation format, which contained the stipulation of 26% of minimum upset bid development share created the confusion and that respondent No. 2 while working out the minimum guaranteed share calculated 26% on the total layout area of 2,86,450 Sq. yards which represented "Minimum upset bid development share" and mentioned the figure of 74,477 Sq. yards under Column No. 5 instead of mentioning 2,86,450. They further submitted that by accepting respondent No. 2's offer, respondent No. 1 has not violated any of the tender conditions or legal rights, if any, of the petitioner.

8. I have carefully considered the submissions of the learned Counsel for the respective parties and perused the record.

Sub-Clauses 1, 8 and 17 of Clause 6.7 of the RFP, which are relevant for the present purpose are extracted hereunder:

6.7.1. Bids that are incomplete in any respect or those that are not consistent with the requirements as specified in this Request for Proposal of those that do not contain the Covering Letter or Letters of Commitment/Acceptance as per the specified formats may be considered non-responsive and shall be liable for

rejection.

6.7.8. No change in or supplementary information to a Bid shall be accepted once submitted. However, VUDA reserves the right to seek additional information from the Bidders, if found necessary, during the course of evaluation of the Bid. Non-submission, incomplete submission or delayed submission of such additional information or clarifications sought by VUDA, the Bid would be evaluated solely on the basis of the available information and shall be a ground for rejecting the Bid and shall be dealt accordingly.

6.7.17. If any claim made or information provided by the Bidder in the Bid or any information provided by the Bidder in response to any subsequent query by VUDA, is found to be incorrect or is a material misrepresentation of facts, then the Bid shall be liable for rejection. Mere clerical errors or bonafide mistakes may be treated as an exception at the sole discretion of VUDA and if VUDA is adequately satisfied.

From the above reproduced Clauses of the RFP, it is evident that if the bids are incomplete in any respect or not consistent with the requirements as specified in the RFP, they are liable to be treated as non-responsive under Sub-clause 1 of Clause 6.7; under Sub-clause 8, respondent No. 1 reserved its right to seek additional information from the bidders, if found necessary, during the course of evaluation of the bid; and under Sub-clause 17 respondent No. 1 is entitled to treat mere clerical errors or bona fide mistakes as exception to the normal rule regarding the correctness of the claim or information submitted by the bidders.

9. Respondent No. 1, being an organ of the State, is bound to strictly adhere to the terms of the RFP and any deviation therefrom resulting in causing harm to public interest shall be at the pain of invalidation by the superior courts. It is, therefore, necessary to examine whether respondent No. 1 made any departure from the RFP conditions and its action affected public interest.

10. In the affidavit filed in support of the Writ Petition, the petitioner averred that on 18-1-2008 finding that respondent No. 2's commercial bid was technically wrong, respondent No. 1 declared the petitioner as the successful bidder and that all the four bidders congratulated the petitioner for having become successful bidder. This was specifically denied in paragraph 26 of the counter-affidavit filed on behalf of respondent No. 1. It was stated therein that the question of selection of the successful bidder only arises after due evaluation of the commercial offers and preparation of the ranked list and its acceptance by the Committee set up by respondent No. 1 for that purpose. Respondent No. 1 also denied the claim of the petitioner that it was congratulated for being a successful bidder. Except making a plea, the petitioner did not file any proof in support of the same. Even otherwise, the schedule fixed under the RFP merely provided for opening of "Financial Proposal" (Cover-3) and it does not envisage its evaluation and declaration of result at that point of time. Since the commercial offers are required to be evaluated in consultation with the

consulting agency of respondent No. 1, it would not have been possible for respondent No. 1 to declare the petitioner as the successful bidder immediately on the opening of the commercial offers on 18-1-2008. This conclusion of mine draws further support from the record produced by respondent No. 1, which reveals that the letter addressed by respondent No. 2 on 18-1-2008 was immediately referred on the same day by respondent No. 1 to the Managing Director of APITCO and the latter submitted their evaluation report through covering letter dated 21-1-2008. It is, therefore, not possible to accept the contention of the petitioner that it was declared as a successful bidder on 18-1-2008.

11. A perusal of the record reveals that on 18-1-2008 respondent No. 2 addressed a letter to the Vice-Chairman of respondent No. 1, wherein it was mentioned that respondent No. 2 quoted 74,477 Sq. yards instead of 2,32,139 square yards as equivalent to 81.04% of the estimated total area of 2,86,450 Sq. yards, which was a clerical error and that they reaffirmed to respondent No. 1 that their bidding development share is 81.04%, which comes to 2,32,139. On the same day, respondent No. 1 forwarded the said letter to the Managing Director of APITCO, vide letter Rc. No. 10593/07/PMU, dated 18-1-2008. While evaluating the bids, the APITCO noted that respondent No. 2 clarified that they misunderstood about the offer mechanism for minimum guaranteed share while they in fact intended the same percentage of 81.04 if put in absolute figures for the minimum guaranteed share. The consultant also observed that respondent has the right to seek clarification without affecting the percentage and acceptance of respondent No. 2's claim does not result in any deviation from the RFP conditions or any change in the valuation criteria, since what exactly respondent No. 2 wanted was to mention the percentage in absolute figures. The consultant also took note of the fact that difference between respondent No. 2's offer and the petitioner's offer comes to 37,277 Sq. yards, which, at the prevailing market rate, comes to Rs. 13.21 crores. These recommendations of the consultant were accepted and respondent No. 1 awarded the contract to respondent No. 2.

12. On a close examination of the facts as noted above, I feel inclined to accept the stand of respondents 1 and 2 that mentioning of the figure 74,477 in Column No. 5 under "Minimum guaranteed share in Sq.yards" is a bona fide mistake. It is not in dispute that the RFP stipulates the minimum upset bid development share as 26% of the estimated total layout area (vide Ex.9 of commercial offer format). This is different from the minimum guaranteed share, which is contained in Column No. 5. Minimum guaranteed share shall be the resultant sum of the development share in percentage worked out on the total lay out area. This necessarily means that the percentage mentioned in Column No. 4 should tally with the figure mentioned in Column No. 5. The case of respondent No. 2 is that though it intended to offer 81.04% towards development share to respondent No. 1, in specifying the resultant figure in terms of Sq. yards, it worked out 26% on the total lay out area of 2,86,450, which is the minimum upset bid

development share as distinguished from the minimum guaranteed share in Column No. 5.

13. At the hearing, learned Counsel for the petitioner did not dispute that the figure of 74,477 is equivalent to 26% of 2,86,450, which is the total layout area worked out by respondent No. 1 and that if the said layout area is worked out on 81.04%, the total minimum guaranteed share will come to 2,32,139.08 Sq. yards. The consultant of respondent No. 1 went into this issue and agreed with respondent No. 2 that the figure mentioned in Column No. 5 is a bona fide clerical error and instead of mentioning 2,32,139.08 Sq. yards, the figure of 74,477 Sq. yards was mentioned.

14. After a careful scrutiny of the pleadings and the material, I am satisfied that there is no arbitrariness or illegality in respondent No. 1 accepting the bid of respondent No. 2. As contended by the learned counsel for respondents 1 and 2, there was a possibility of the bidder getting confused between the minimum upset bid development share stipulated at 26% and minimum guaranteed share, which should be worked out on the percentage offered by the bidders on the total layout area.

15. The argument advanced by the learned Counsel for the petitioner based on Clause 6.7.8 that respondent No. 1 did not seek clarification from respondent No. 2 has no merit. The pleadings of respondent No. 1 and the record reveal that when the APITCO pointed out error on the opening of Cover-3 on 18-1-2008, respondent No. 2 gave the letter. Thus, the clarification sought for by respondent No. 1 was replied by respondent No. 2 based on the error pointed out by APITCO. This procedure is, therefore, in consonance with Clause 6.7.8 and in accepting the bid of respondent No. 2, respondent No. 1 exercised its power to accept correction of clerical or bona fide mistakes contained in Clause 6.7.17.

16. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , it was held by the Supreme Court that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction and that in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. It was further held that when a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition and if the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. This view is reiterated by the Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, . It was held that even when some defect is found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and exercise it only in furtherance of public interest and not merely on the making out of a legal point, and that the court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. It was also held that only when a court comes to the conclusion that

overwhelming public interest requires interference, the court should intervene.

17. By applying the above mentioned settled legal principles to the present case, I am of the considered view that the overwhelming public interest lies in not interfering with the decision taken by respondent No. 1 in awarding the contract to respondent No. 2. It is not in dispute that difference in offers made between respondent No. 1 and the petitioner comes to around Rs. 13.21 crores, which respondent No. 1 would gain if the offer of respondent No. 2 is accepted. On a deep consideration of the entire case, I am fully convinced that respondent No. 1 acted within the parameters of the RFP and by accepting the offer of respondent No. 2 it acted in furtherance of larger public interest.

18. For the above mentioned reasons, the Writ Petition fails and is accordingly dismissed.